SOH CHUN SENG

v.

CTOS-EMR SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[CIVIL SUIT NO: S2-23-35-1997]
12 JUNE 2003

TORT: *Defamation - Publication of credit check report - Report stated that a creditor's petition was issued against plaintiff but did not state that it was struck off - Report made it clear that information was not current and that check with parties concerned was necessary - Whether report was defamatory of plaintiff - Whether report should reflect true situation - Whether defendant was under a duty to provide up to date status - Whether report was true in substance and fact*

The plaintiff who was a businessman and director of several companies claimed damages for defamation arising from the defendant's publication of a credit check report ('the report') about him. The defendant was in the business of providing information collated and compiled in its database from public records and had provided the report upon request of one of its clients. In a gist, the report stated that there was a creditor's petition issued against the plaintiff. The plaintiff claimed that the report did not reflect the true situation in that the petition had been struck off. Further, the defendant had caused injury to his reputation as anyone reading the report would assume that he was, *inter alia*, an undischarged bankrupt, an adjudicated bankrupt, insincere and untrustworthy and that the companies under his management were neither stable nor sound. The defendant claimed that the report was obtained from the Star newspaper and was in substance and in fact true. Also, that it had no knowledge that the petition had been struck off. In fact, the header at the beginning of the report read, amongst others, that the information contained therein was not intended as confirmation of the current status of the creditor's petition and that a check with the parties concerned was necessary.

The issues: (1) whether the report ('exh. P2') was defamatory of the plaintiff; and (2) whether the defendant was under a duty to provide an up to date status of the bankruptcy proceedings brought against the plaintiff before it published the matters contained in exh. P2.

Held:

[1] The court must construe the entirety of exh. P2 and ask if an ordinary, reasonable and fair-minded person who reads the whole of exh. P2 would discern the meaning as alleged by the plaintiff. The header made it plain to any reasonable reader that the information that appeared below it was not intended as confirmation of the current status of the creditor's petition and if the reader wished to know the current status, a check with the parties concerned was necessary. The header made it plain that it only served to confirm that the information appearing below it had been obtained from The Star newspaper. (pp 55 b & 56 d)

[2] Having noted the contents of the header, no reasonable reader of exh. P2 could conceivably reach the conclusion as suggested by the plaintiff. Further, no reasonable reader could conclude that the information appearing below the header might touch on the reputation of companies under the management of the plaintiff, save and except by an unreasonable stretch of imagination. By the contents of the header, the defendant had in fact asserted that the information that appeared below the header was not intended to mean any of the imputations that the plaintiff alleged. (pp 56 e & 57 a)

[3] The header must be read together with the report based on the English House of Lords case of *Stubbs, Limited v. Russel*. There is no provision in the Defamation Act 1957 governing the principles upon which the courts are to construe that the words complained of are defamatory in meaning. Therefore, the English common law principles as pronounced in the said case continue to apply and form part of the law in Malaysia. It followed that the plaintiff failed to establish that the contents of exh. P2 were defamatory eventhough on evidence the plaintiff might have proved that the information or words therein referred to him and also that the words were published by the defendant. On this ground alone, the plaintiff's claim against the defendant could be dismissed with costs. (pp 58 a-d & 59 b)

[4] The law of libel affords a remedy where a person is libeled by the publication of defamatory words. The omission to publish words is not within the domain of the tort of libel. Where such omission has occasioned loss to a party, that party may have his remedy in the tort of negligence. The ingredients of the tort of negligence should not be used to make true but defamatory statements actionable particularly so when in the present

case the plaintiff's application to amend his statement of claim to include an alternative claim under the tort of negligence had been dismissed earlier by the court. (pp 60 b & 61 d)

[5] As the words complained of were not defamatory of the plaintiff, the defendant was not required to put up any defence to the plaintiff's claim. In any event, the defendant by its own evidence as well as the evidence of the plaintiff himself had clearly shown that those words were in substance and fact true. Truth is an absolute defence to an action for libel or slander. (pp 61 f & 63 f)

[Plaintiff's claim dismissed.]

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1966] 2 MLJ 66 ***(refd)***

Ayob Saud v. TS Sambanthanmurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 ***(refd)***

Balfour v. Attorney-General [1991] 1 NZLR 519 ***(refd)***

Bell-Booth Group Ltd v. Attorney-General [1989] 3 NZLR 148 ***(refd)***

Dato' Musa Hitam v. SH Alattas & Ors [1991] 1 CLJ 314; [1991] 2 CLJ 487 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. Dato' Seri Mahathir Mohamed [1999] 7 CLJ 32 HC ***(refd)***

Hasnul Abdul Hadi v. Bulat Mohamed & Anor [1978] 1 MLJ 75 ***(refd)***

Kapt (B) Hj Mohd Ismail v. Perwira Affin Bank Bhd (No 2) [2001] 5 CLJ 184 HC ***(refd)***

Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***

Le Mercier's Fine Furnishing Pte Ltd & Anor v. Italcomm (M) Sdn Bhd [1996] 3 CLJ 590 HC ***(refd)***

Noor Asiah Mahmood & Anor v. Randhir Singh & Ors [2000] 5 CLJ 407 HC ***(refd)***

Pong Fee Voon v. Piong Kien Siong & Ors [1999] 8 CLJ 383 HC ***(refd)***

Progressive Insurance Sdn Bhd v. RM Insurance Underwriting Agency Sdn Bhd & Ors [2003] 5 CLJ 321 HC ***(refd)***

Ratus Mesra Sdn Bhd v. Shaikh Osman Majid & Ors [1999] 8 CLJ 499 HC ***(refd)***

S Pakianathan v. Jenni Ibrahim [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***

Stubbs, Limited v. Russel [1913] AC 386 ***(foll)***

Uniphone Sdn Bhd v. Chin Boon Lit & Anor [1998] 6 MLJ 441 HC ***(refd)***

Zolkefly Haron v. Yahya Chik & Anor [2001] 6 CLJ 285 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3

Other source(s) referred to:
Gatley on Libel and Slander, 9th edn, pp 6, 80, 96
Keith Econs, *The Law of Defamation in Singapore and Malaysia*, 2nd edn, p 49

For the plaintiff - Philip Chai (CW Kok); M/s Soo Thien Ming & Nashrah
For the defendant - Haris Mohd Ibrahim (Nor Isman Ismail); M/s Liza Chan & Co

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali J:
By his statement of claim, the plaintiff is claiming for damages for defamation arising from a libellous statement which has been published against him by the defendant. In particular, the plaintiff states that by a report dated 29 April 1997 the defendant published statements to Audio One Entertainment Sdn. Bhd. which by its natural and ordinary meaning and/or innuendo are false and libellous in nature thereby causing injury to the plaintiff's reputation.

The defendant's defence is premised on the grounds that the words are not defamatory and the words are true in substance and in fact.

Facts Of The Case
The plaintiff is, at all material times, a businessman and director of several companies known as the Audio One Groups of Companies. The plaintiff alleged that by a credit check report dated 29 April 1997 undertaken by the defendant at the request of a customer of the defendant, the defendant had reported, printed and published or caused to be reported, printed and published defamatory words of and concerning the plaintiff. The report states, *inter alia*, as follows:

> Credit Search Report Dated 29-04-97 Done by: Sabila
>
> IMPORTANT: This report is confidential. Reproduction is prohibited. The report only indicates the information was published in the relevant source. It is NOT intended as confirmation of the "current status" of the case. For the case's current status, your further probe with the relevant parties is required ...
>
> **Information As Per CTOS Database Are As Follows:**
>
> Bankruptcy-Creditor's Petition Issued Special Remark:
>
> Name: Soh Chun Seng
>
> I/C No: 4695233/541023106353

Remark:

Exparte: American Express – Jln Sultan Ismail, KL

Bankruptcy No. D5-29-5830-92

Notice Date:

High Court Kuala Lumpur

Petition Date: 301092 Star 010493

Hearing Date: 040593

Order Date:

Annualmnt/Disc:

Amount:

Solctr: Isharidah Ho Chong & Menon
Lot 903, 9th Floor
Wisma HLA
Jalan Raja Chulan
50200 Kuala Lumpur
Ref: IHCM/A3/92/NA/NA
TEL: 03-2420022/2447975

The plaintiff contends that the report published by the defendant has caused injury to the plaintiff's reputation as it infers to anyone who has read the report that:

(a) the plaintiff is an undischarged bankrupt;

(b) the plaintiff has been adjudicated a bankrupt;

(c) the plaintiff is an insincere person and is untrustworthy;

(d) the plaintiff is not fit to be a businessman and/or is not an honest and financially sound director; and

(e) by reason of the matters state in (a) (b) (c) and (d) above, the companies under the management of the plaintiff qua director are neither stable nor sound.

The plaintiff pleads that the said credit check report does not reflect the true situation in which the Kuala Lumpur High Court had, on 23 September 1992, in the Bankruptcy Case No: D5-29-5830-92 ordered that the creditor's petition dated 30 October 1992 presented against the plaintiff (which was the subject matter of the contents of the said report) be struck off.

By way of support for his claim to be entitled to exemplary or aggravated damages, the plaintiff complained that his application to Citibank for a Credit Card in or about December 1993 was rejected on account of the publication by the defendant of the credit check report. Further, the plaintiff also complains that an application by Audio One Entertainment Sdn. Bhd. for an industrial line-purchase facility of RM3 million to Hong Leong Finance Bhd. on or before December 1996, was not considered an account of the same publication by the defendant. The plaintiff further pleads that by a letter dated 14 May 1997 the solicitors for the plaintiff had written to the defendant requesting that the information relating to the plaintiff in the credit check report be deleted, the defendant apologise and pay damages; but the defendant failed, neglected and refused to do so.

The defendant, on the other hand, was incorporated on 13 October 1994 as Crisis Management Sdn. Bhd. and commenced its operation on 1 April 1995. The defendant then changed its name to CTOS-emr Sdn. Bhd. on 15 February 1996. The defendant is in the business of providing information collated and compiled in its database from public records such as government gazettes; newspapers and data from searches conducted at the Registry of Business and the Companies Commission of Malaysia for its clients quick and easy reference and access for a fee. The defendant admitted that at the request of Audio One Entertainment Sdn. Bhd., the defendant had, on 29 April 1997, furnished to Audio One Entertainment Sdn. Bhd. the said credit check report based on the information collated and compiled in its database relating to the plaintiff, which was obtained from the Star newspaper dated 1 April 1993. The defendant states that the information furnished to Audio One Entertainment Sdn. Bhd. in respect of the plaintiff was correct in every respect, to wit, that a creditor's petition dated 30 October 1992 was presented against the plaintiff at the instance of American Express (M) Sdn. Bhd. *vide* Kuala Lumpur High Court Bankruptcy No: D5-29-5830-92, and a notice of the same was advertised in The Star Newspaper by way of substituted service. The defendant denies that the information furnished was false or defamatory and was capable of bearing the meanings as pleaded by the plaintiff. The defendant admits receiving the letter dated 14 May 1997 from the plaintiff's solicitors and states that the same was replied by a letter dated 19 May 1997 wherein the plaintiff's solicitors were requested to furnish evidence that the creditor's petition in the Bankruptcy Case No: D5-29-5830-92 was struck off on 23 September 1993. This, the plaintiff or his solicitors has failed to do. The defendant states that prior to 19 May 1997 the defendant had no knowledge that the said creditor's petition has been struck off. Premised on the pleadings, the defendant raised three specific defences to the plaintiff's claim, namely:

(a) the words complained of do not bear the defamatory imputations as contended by the plaintiff;

(b) the words complained of are in substance and in fact true; and

(c) the words complained of were published on an occasion of 'qualified privilege'.

However, given the evidence that has emerged in the course of the trial in this action, the defendant chosed not to pursue the 3rd defence on 'qualified privilege".

The Relevant Law

In my earlier decision in *Progressive Insurance Sdn. Bhd. v. RM Insurance Underwriting Agency Sdn. Bhd. & Ors* [2003] 5 CLJ 321, I have referred to the pronouncement of Mohamed Dzaiddin J (as he then was) in the case of *Ayob bin Saud v. T.S. Sambanthanmurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 as having clearly laid down the necessary burden in establishing a claim for libel. In that case, His Lordship Mohamed Dzaiddin J had stated the law to be as follows:

> In our Law on libel, which is governed by the Defamation Act, 1957, the burden of proof lies on the Plaintiff to show:
>
> i) the words are defamatory;
>
> ii) the words refer to the Plaintiff; and
>
> iii) the words were published.

The plaintiff must first discharge the onus of proving that the words complained of were defamatory of the plaintiff. Only upon the plaintiff establishing this does the burden then rest on the defendant to prove that those words are in substance and in fact true. (See: Supreme Court decisions in *S. Pakianathan v. Jenni Ibrahim* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 and *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 2 MLJ 66).

Whether The Words Published Are Defamatory

The relevant information or words complained of by the plaintiff are found in the credit check report dated 29 April 1997 which has been marked as exh. "P2". A perusal of exh. P2 readily discloses that this document contains a heading which reads as follows:

> IMPORTANT: This report is confidential. Reproduction is prohibited Report only indicates the information was published in the relevant source. It is not intended as confirmation of the current status of the case. For the case's current status, your further probe with the relevant parties is required.

A comparison between the particulars in para. 5 of the statement of claim, wherein the plaintiff details the words complained of with the contents of the whole of exh. P2 (in its entirety) reveals that the plaintiff has omitted the entire heading at the top of exh. P2 in the particulars in para. 5 of the statement of claim. In construing the meanings of the words complained of as pleaded by the plaintiff, the court must do so in the context of the entirety of the contents of exh. P2.

In *Gatley on Libel and Slander*, 9th edn at p. 96 the learned author states:

> It is necessary to take into consideration, not only the actual words used, but the context of the words.

At p. 97, the learned author continues:

> It follows from the fact that the context and circumstances of the publication must be taken into account and that the Plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages which take away the sting.

Our courts have also pronounced the same principle to be the law applicable in Malaysia. In *Ratus Mesra Sdn. Bhd. v. Shaikh Osman Majid & Ors* [1999] 8 CLJ 499, Kamalanathan Ratnam J, at p. 504 stated that:

> I agree that the test to be applied when considering whether a statement is defamatory of a Plaintiff is an objective one in that it must be given a meaning in which a reasonable man would understand it (See: *Gatley on Libel & Slander*, 9th Edition para 3.12) and that for this purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article.

In another case, *Noor Asiah Mahmood & Anor v. Randhir Singh & Ors* [2000] 5 CLJ 407 the High Court has also stated:

> I must hasten to add that the same authority reflected the view that a claim for libel whilst not to be founded on a headline or photograph in isolation from the related text, the question whether the article was defamatory had to be answered by reference to the response of the ordinary reasonable reader to the entire publication.

In construing the words complained of to determine if they are capable of bearing defamatory meanings or not, the court must also endeavour to read those words through the eyes of the "hypothetical reasonable person," In *Gatley on Libel & Slander*, 9th edn at p. 80, the learned author opines as follows:

> If words conveyed a defamatory imputation to those to whom they were published, but would not have done so to the hypothetical reasonable person in that position, they are not defamatory. The essence of libel is the publication of written words to a person or persons by whom they would be reasonably understood to be defamatory of the Plaintiff" so that the mere fact that the hearers understood the language in a defamatory sense does not make it defamatory unless they were reasonably justified in so understanding it. In the case of words defamatory in their ordinary sense it is not permissible to call evidence to prove that anyone did understand the words in a defamatory sense, but the question is simply whether reasonable people would have so understood them.

At p. 81, the learned author of Gatley postulates the following question as an appropriate one to ask in trying to get the natural and ordinary meaning of the words complained of. The question is:

> What would the words convey to the mind of the ordinary, reasonable, fair-minded reader.

In my earlier decision in *Kian Lup Construction v. Hongkong Bank Malaysia Bhd.* [2002] 7 CLJ 32 I had adopted the same approach proposed by the learned author of Gatley as stated above.

At p. 42 of *Kian Lup Construction* case I have stated the followings:

> In determining the issue, this court does not look to the actual effect of the allegation on the person's reputation, or the meaning of the words actually understood or taken by the listeners, (See: *JB Jeyaretnam v. Goh Chok Tong* [1985] 1 MLJ 334.) It is not enough that the listeners actually take the words in a defamatory sense, for they must be reasonably justified in so understanding the words before they are found to be defamatory (see *The Straits Times Press (1975) Ltd v. The Workers' Party & Anor* [1987] 1 MLJ 186).

The court is also of the view that in construing what the words complained of might reasonably mean, such meanings that can only be arrived at by a strained or utterly unreasonable interpretation are to be rejected. I find support for this view in the decision of Suriyadi Halim Omar J in *Pong Fee Voon v. Piong Kien Siong & Ors* [1999] 8 CLJ 383. In that case it was held:

> How to arrive at their natural and ordinary meaning again is no easy matter, but necessitates the presiding judge to scrutinise the words. There should not be any unnecessary intellectual exercise to arrive at the meanings of those words. In other words, the whole process should be effortless. For this purpose courts must reject meanings which can only emerge as a product of some strained or forced or utterly unreasonable interpretation.

Similarly, in *Le Mercier's Fine Furnishing Pte. Ltd. & Anor v. Italcomm (M) Sdn. Bhd.* [1996] 3 CLJ 590, James Foong J, at p. 593, stated:

> It is also necessary in considering this issue on the meaning, the court must not put a strained or unlikely construction upon the words ... .

Based on all the above authorities, I am of the view that in considering whether the words complained of are defamatory or capable of bearing the meanings as alleged by the plaintiff, the court must construe the entirety of exh. P2 and ask if an ordinary, reasonable and fair-minded person who reads the whole of exh. P2 would discern the meaning as alleged by the plaintiff.

By para. 6 of the the statement of claim, the plaintiff pleads 5 meanings which he alleged the words complained of bear on him. These are:

i) that the Plaintiff is an undischarged bankrupt;

ii) that the Plaintiff has been adjudicated a bankrupt;

iii) that the Plaintiff is an insincere person and is untrustworthy;

iv) that the Plaintiff is not fit to be a businessman and/or is not an honest and financially sound director; and

v) by reason of the matters stated in (i), (ii), (iii) and (iv) above, the companies under the management of the Plaintiff qua director are neither stable nor sound.

Exhibit P2, on the other hand, contains the following informations:

i) a Creditor's Petition was presented in the Kuala Lumpur High Court *vide* Bankruptcy No. D5-29-5830-1992;

ii) the Creditor's Petition was presented on 30th October, 1992;

iii) the Plaintiff was named as Respondent therein;

iv) the Plaintiff's old NRIC number is stated as being 4695233 whilst his new NRIC number is stated as being 541023106353;

v) the Plaintiff's address is stated as being No. 7, Jalan 109, Kepong Baru, Kuala Lumpur;

vi) the Creditor's Petition was presented by American Express (Malaysia) Sdn. Bhd.;

vii) the Creditor's Petition was fixed to be heard on 4th May, 1993;

viii) the solicitors acting for the Petitioner were Messrs. Isharidah, Ho, Chong & Menon; and

ix) a notation "STAR 010493", thus indicating that the source of information as being The Star issue of 1st April, 1993.

and all those information was preceeded by the header.

The court must scrutinise the matters stated in exh. P2 relating to the plaintiff and the creditor's petition and, in the light of the header which preceeded the information, consider whether an ordinary, reasonable and fair-minded person who reads the whole of exh. P2 would discern the meanings as alleged by the plaintiff.

The header makes it plain to any reasonable reader that the information that appears below it, is not intended as confirmation of the current status of the creditor's petition and that if the reader wishes to know the current status, a check with the parties concerned is necessary. The header makes it plain that it only serves to confirm that the information appearing below it had been obtained from a source, ie, The Star newspaper.

No reasonable reader of exh. P2, having noted the contents of the header, could conceivably reach the conclusion as suggested by the plaintiff that the information appearing below it meant that the plaintiff was an undischarged bankrupt, or had been adjudicated a bankrupt, or was insincere and untrustworthy; was not fit to be a businessman, not honest or not financially sound. Certainly no reasonable reader could conclude that the information appearing below the header might touch on the reputation of companies under the management of the plaintiff, save and except by an unreasonable stretch of imagination.

If the meanings suggested by the plaintiff are the result of a fanciful imagination of the reader rather than a reasonable, natural and ordinary reading of the whole of exh. P2 the defendant cannot be held to account for the some. The learned author of Gatley, at p. 88, put it this way:

> Although the judge does not have to be satisfied that the defamatory meaning contended for by the plaintiff is more probable than an alternative, innocent meaning, yet he should 'reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation', and 'it is not enough to say that by some person or another the words might be understood in a defamatory sense'. Mere conjectures which some person might possibly though unreasonably form are not enough to leave the case to the jury.

The court is satisfied that by the contents of the header, the defendant has in fact asserted that the information that appears below the header is not intended to mean any of the imputations that the plaintiff alleged. To borrow the words of His Lordship Justice Kinnear, in the House of Lords case of *Stubbs, Limited v. Russel* [1913] AC 386 at p. 392 "... what it is intended to represent is explained in a head-note, which must be read along with it in order to make it convey any intelligible meaning," and when it is so read it is impossible that any reasonable man should collect from it the libelous imputation alleged.

In *Stubbs, Limited* case, the plaintiff, a businessman, complained that the defendant had published the plaintiff's name in a weekly trade journal under a list of persons against whom judgment in default had been obtained in the small claims court. Just above the list, there appeared the following header:

> Extracts from the Court Books of Decrees in Absence in the Small Debt Court. Note:- The following extracts from the Court Books have been received since our last issue, made up to the several dates given in the second column. It is probable that some of the decrees have been sisted, settled or paid; and in no case does publication of the decree imply inability to pay on the part of one named, or any things more than the fact that the entry published appeared in the Court Book ...

In actual fact, the debt in question (in that case) had been settled and the action dismissed, no default judgment being recorded against the plaintiff. The plaintiff alleged that the entry of his name in the list, which he described as a 'Black List' falsely and maliciously represented that he was unable to pay his debts, he was insolvent and he was evading payment of a just debt. In the House of Lords the plaintiff's claim was disallowed. It was held by the House of Lords (at p. 392):

> The alleged ground of action is an entry in what he describes as the defender's black list. But the entry is a mere statement of names, with a date and a sum of money; and what it is intended to represent is explained in the head-note, which must be read along with it in order to make it convey any intelligible meaning.

At p. 394, His Lordships Justice Kinnear concluded:

> I think It clear, in the first place, that the whole of the statement in the head-note, as I have quoted it, must be read in conjunction with the alleged excerpt from the Sheriff's Court Books, and secondly, that when it is so read it is impossible that any reasonable man should called from it the libelous imputation alleged.

Pursuant to s. 3 of the Civil Law Act 1956, the principles of law and their application in *Stubbs, Limited* case are not merely persuasive authority before the Courts in Malaysia but represent our law. This was emphasised by Barakbah CJ in *Abdul Rahman Talib v. Seenivasagam & Anor (supra)*, at p. 72, as follows:

> By section 3 of the Civil Law Ordinance 1956, the Common Law of England is applicable in Malaysia except in so far as it has been modified by the Defamation Ordinance 1957.

More recently, in the case of *Pang Fes Yoon (supra)*, Suriyadi Halim Omar J, reaffirmed the applicability of the English Common Law to the law of defamation in Malaysia, when he said:

> By virtue of s. 3 of the Civil Law Act 1956, the English Common Law which is the spring board of the local defamation law, has been statutorily imported keeping abreast with time, the Defamation Act 1957 (Act 286) was promulgated, together with the necessary modification.

In our present Defamation Act 1957 there is no provision therein governing the principles upon which our courts are to construe the words complained of to determine if the same are capable of a defamatory meaning. In other words, in this area of the law of defamation, English Common Law principles (as pronounced by the House of Lords in *Stubbs, Limited* case) continue to apply and form part of the law in Malaysia.

In the light of the authorities referred to above, when the whole of exh. P2 is reasonably construed, the only meaning that it can bear is that the information furnished to Audio One Entertainment Sdn. Bhd. relating to the plaintiff could only mean what was narrated therein, to wit, that a creditor's petition was presented against the plaintiff on 30 October 1992 at the High Court of Kuala Lumpur at the instance of American Express (M) Sdn. Bhd. and notice of the some was advertised in The Star newspaper by way of substituted service. To find that the meanings as alleged by the plaintiff are reasonably borne out, notwithstanding the header in exh. P2 would, as concluded by His Lordship Justice Show at p. 398 of the *Stubbs, Limited* case, permit a "strained and sinister interpretation, which is thus essentially unjust'. What the report intended to represent is clearly explained in the header which must be read together with the report.

In short, all that the defendant was doing was to confirm that the information appeared in a particular source mention in the report ie, The Star newspaper dated 1 April 1993. The defendant was in effect saying:

> We confirm that a Creditor's Petition was presented against the Plaintiff by American Express (M) Sdn. Bhd. Notice of the same was advertised in The Star newspaper. We do not know the current status of the Creditor's Petition. If you wish to know the current status of the same you are advised to check with the relevant parties.

Therefore, the court is satisfied that the plaintiff has failed to establish that the contents of exh. P2, which is the subject matter of the present action, are defamatory, eventhough on evidence, the plaintiff may have proved that those information or words therein refer to the plaintiff and that the words were published by the defendant. On this ground alone, the plaintiff's claim against the defendant can be dismissed with costs.

Tort Of Libel v. Tort Of Negligence

One pertinent point observed by the court in this action is that the plaintiff, in trying to establish his claims against the defendant has attempted to merge two separate and independent torts, to wit, the tort of libel with the tort of negligence, for an alleged loss of reputation. From the records available, the plaintiff had, at the eleventh hour, applied to amend his statement of claim to include an alternative claim in the tort of negligent misstatement. This application was however, dismissed. In the proposed amended statement of claim, the plaintiff alleged that the defendant was under a duty to the plaintiff to take care in furnishing information relating to its financial institution clients; that the defendant breached that duty in failing to update the information in its database relating to the plaintiff and in failing to include in the information so furnished a remark that the creditor's petition presented against the plaintiff had been struck out on 23 September 1993. Since the proposed amendment to the statement of claim was dismissed, it is not open to the plaintiff to advance his alternative claim of negligent misstatement and all of the matters raised in the proposed amendments. Yet, through his written submissions, the plaintiff has time and again advanced propositions, in support of his claim in libel, which propositions would only pertain in claim in tort of negligence or negligent misstatement. (see para 9.5 and 12.1 of the plaintiff's written submissions).

The plaintiff admitted the truth of the matters contained in exh. P2 as a matter of historical account. What the plaintiff now purports to do is to move this court to find that the defendant was under a duty, imposed in the law of libel, if it chose to publish the matters contained in exh. P2, to also publish the most up-to-date account as to the status of the bankruptcy proceedings brought against the plaintiff. The plaintiff also asked that this court find that the defendant was under a duty, imposed in the law of libel, to make every effort to ascertain the most up-to-date account as to the status of the bankruptcy proceedings before it published the matters contained in exh. P2, notwithstanding

that the matters are factually correct. It also appears that the plaintiff proposes that this court hold that unless the defendant was able to publish the entire history of the bankruptcy proceedings brought against the plaintiff, the defendant was under a duty, imposed in the law of libel, not to publish the matters.

The court cannot agree with the plaintiff's propositions. The law of libel affords a remedy where a person is libeled by the publication of defamatory words. Damages for the omission to publish words, is not the domain of the tort of libel. It may well be that where such omission has occasioned loss to a party, that party may have his remedy in the tort of negligence, but as the law of libel caters for situation where words are published, a complaint of omission to publish, fundamentally, cannot found an action in libel. The law of defamation imposes a singular, paramount duty on the publisher – to speak to truth. In *Bell-Booth Group Ltd v. Attorney-General* [1989] 3 NZLR 148, the plaintiff presented a claim in libel and in the alternative, the tort of negligence in respect of a programme that was broadcasted on television. The claim in libel was dismissed as the trial judge found the words published during the broadcast to be true in substance and fact and the defence of justification was made out. The trial judge however found the 1st defendant liable in negligence as being in breach of a duty of care to first disclose to the plaintiff some of the matters prior to their being broadcasted, and the broadcast was therefore in breach of that duty. The 1st defendant appealed to the New Zealand Court of Appeal against the finding of liability in negligence in respect of the broadcast. The appeal was allowed. At p. 156, His Lordship Cooke P stated:

> To an action in defamation, truth is an absolute defence ... The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element ... The duty in defamation may be described as a duty not to defame without justification or privilege or otherwise than by way of fair comment.

In another case, *Balfour v. Attorney-General* [1991] 1 NZLR 519, the plaintiff, who brought an action in, *inter alia*, tort of negligence, sought damages for injury to his reputation, together with other heads of damages, arising from allegations of his homosexuality. His Lordship Harde Boys J, who sat in the New Zealand Court of Appeal stated:

> Any attempt to merge defamation and negligence is to be resisted. Both these branches of the law represent the result of much endeavour to reconcile competing interests in way appropriate to the quite distinct areas to which they are concerned, but not necessarily appropriate to each other ... An inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame.

The above principle, was adopted by our courts. In *Uniphone Sdn. Bhd. v. Chin Boon Lit & Anor* [1998] 6 MLJ 441, the High Court was confronted with a claim in negligence in respect of an article which was published in a newspaper which, as it turned out, was in substance and in fact, true. The plaintiff, in effect was claiming damages in negligence for the publication of words which were not false. It was held by the court:

> It is my judgment that the tort of negligence ought not to restrict the freedom of speech, and restrain publishing statement which are true. It ought not to be the law that a person cannot make a statement which is true if it is foreseeable that the making of that statement could cause loss to a third party who admits to the truth of that statement.

The same principle was also adopted and followed by the High Court in *Kapt. (B) Hj. Mohd. Ismail v. Perwira Affin Bank Bhd. (No. 2)* [2001] 5 CLJ 184.

Based on those authorities, my conclusion on this point is that ingredients of the tort of negligence should not be allowed to be used to make true but defamatory statement actionable, particularly so, when, in the present case, the plaintiff's application to amend his statement of claim to include an alternative claim under the tort of negligence, has been dismissed by the court earlier.

Whether The Words Were In Substance And Fact True

As has been stated earlier, the plaintiff in this action must first discharge the onus of proving that the words complained of were defamatory of the plaintiff. Only upon the plaintiff establishing this, does the burden then shift on the defendant to prove that those words were in substance and in fact true, if he wished to raise such defence. (See: *Abdul Rahman Talib v. Seenivasagam*; and *S. Pakianathan v. Jenni Ibrahim (supra)*). In the present case, the court has concluded that the words used in the report were not defamatory. Therefore in law, the defendant is not required to put up any defence to the plaintiff's claim. In any event, even assuming that the plaintiff has successfully established that the words were defamatory, then the court shall now consider whether those words were in substance and fact, true.

In the present case, the plaintiff (PW1) in his evidence admitted that a bankruptcy proceeding was issued against him. He also confirmed that the documents at pp. 48 and 49 of the bundle were the bankruptcy notice and creditor's petition presented against him. (exhs. P3A and P3B). An examination of the creditor's petition (exh. P3A) discloses the followings:

(i) the Creditor's Petition was presented in the Kuala Lumpur High Court *vide* Bankruptcy No. D5-29-5830-1992;

(ii) the Creditor's Petition was presented on 30th October, 1992;

(iii) the Plaintiff was named as Respondent therein;

(iv) the Plaintiff's NRIC number is stated as being 4695233

(v) the Plaintiff's address is stated as being No. 7, Jalan 109, Kepong Baru, Kuala Lumpur;

(vi) the Creditor's Petition was presented by American Express (Malaysia) Sdn. Bhd.;

(vii) the Creditor's Petition was fixed to be heard on 4th May, 1993; and

(viii) the solicitors acting for the Petitioner was Messrs. Isharidah, Ho, Chong & Menon.

A scrutiny of the advertisement of the notice of substituted service (exh. D21) of the creditor's petition that appeared in The Star newspaper dated 1 April 1993 shows that the above details in the creditor's petition were also carried in the advertisement (exh. D21). The contents of report (exh. P2) have been narrated above. Not taking account of the header at the top of the page, exh. P2 contains information identical with that in exhs. P3A and D21, same and except for two-additional pieces of information ie, the plaintiffs new NRIC number (541023106353) and the notation "STAR 010493" which indicates that the source of the information as being The Star issue of 1 April 1993.

By the plaintiff's own testimony, the contents of exhs. P3A and P3B are correct ie, American Express (Malaysia) Sdn. Bhd. had through their solicitors, Messrs. Isharidah, Ho, Chong & Menon, on 30 October 1992 caused to be presented a creditor's petition against the plaintiff *vide* Kuala Lumpur High Court Bankruptcy No: D5-29-5830-1992 which was fixed to be heard on 4 May 1993. This is all that was reported in exh. P2. The court is satisfied that the contents of the report (exh. P2) insofar as the same refer to the plaintiff and the creditor's petition presented against him, are factually correct.

As a matter of law, truth or justification, is an absolute defence to an action in libel or slander. If the statement is true no amount of malice or bad faith or belief in the falsity of the statement will make it actionable. If people think the worst of the plaintiff when they hear the truth about him, then his reputation has been reduced to the proper level, (see: *The Law of Defamation in Singapore and Malaysia* by Keith Econs, 2nd edn, p. 49).

The above principle was followed and adopted in *Hasnul Abdul Hadi v. Bulat Mohamed & Anor* [1978] 1 MLJ 75; and *Dato' Musa Hitam v. SH. Alattas & Ors* [1991] 1 CLJ 314; [1991] 2 CLJ (Rep) 487.

In *Gatley on Libel & Slander*, 9th edn at p. 6, the learned author states the position of the law as follows:

> With one exception relating to spent criminal conviction, truth is a complete defence to an action for defamation in English law, even if the publication is made with a malicious desire to injure the Plaintiff.

At p. 233, the learned author stresses again that: "it is not actionable maliciously to publish the truth." As confirmed by the learned author Keith Evans in the *Law of Defamation in Singapore and Malaysia*, 2nd edn at p. 49, the position of the law in Malaysia on this point is similar to that in England. Similarly in *Zolkefly Haron v. Yahya Chik & Anor* [2001] 6 CLJ 285 the plaintiff sued in respect of alleged defamatory oral and written statements made by the defendants as regards the status of his banking account. Jeffrey Tan J, having found that the statements were true and applying the above principle, dismissed the plaintiff's claim. I am also in full agreement with Kamalanathan Ratnam J in *Dato' Seri Anwar Ibrahim v. Dato' Seri Mahathir Mohamed* [1999] 7 CLJ 32 at p. 39, when he said:

> It follows therefore that what is true, cannot be defamatory. This must be on grounds of public policy because the exposure of truth must be paramount when compared to that of reputation. Therefore clearly there can be no room even for malice if the matter published is found to be true.

Therefore, in the present case, even assuming the words contained in the report (exh. P2) are defamatory, the defendant by its own evidence as well as evidence of the plaintiff himself (PW1) has clearly shown that those words were in substance and fact, true. Based on the above authorities, the court is satisfied that truth is an absolute defence to an action for libel or slander. What is true cannot be defamatory. If truth can be defamatory, then people are scared to tell the truth in disclosing wrongdoings in the society. Public Statements may contain distorting elements. Then falsity and hypocrisy will be the order of the day. The law will not allow that situation to happen beyond control. Therefore the plaintiff's claim against the defendant must fail.

Publication Of The Information To Citibank And Hong Leong Finance Bhd

In his statement of claim (para. 10) the plaintiff also alleged that the said report or information (as in exh. P2) was also published to Citibank and Hong Leong Finance Bhd. by the defendant. This is to support the plaintiff's claim for exemplary or aggravated damages. Unfortunately, the plaintiff did not lead any

evidence, during trial, to support this allegation. The court finds that this aspect of the plaintiff's pleadings remained completely unproven and thus warrants no further consideration.

Conclusion

On the above considerations, the court holds that the plaintiff has failed to establish his claim against the defendant; and therefore the plaintiff's claim is dismissed with costs.